



**OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS**

Lisa Madigan
ATTORNEY GENERAL

June 2, 2004

FILE NO. 04-003

CONSTITUTION:
Thompson Center Mortgage
Loan Agreement as "State Debt"

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The Honorable Peter J. Roskam
Senate Republican Whip
Illinois State Senate
309H State Capitol
Springfield, Illinois 62706

Dear Senator Roskam:

I have your letter wherein you inquire: (1) whether the proposed James R. Thompson Center mortgage-loan agreement, crafted by the Illinois Department of Central Management Services pursuant to the provisions of Public Act 93-019, effective June 20, 2003, constitutes "State debt" as that phrase is defined in article IX, section 9 of the Illinois Constitution of 1970, thereby requiring the enabling legislation to have been passed by a three-fifths vote of each house of the General Assembly; and (2) whether the proposed James R. Thompson Center mortgage-loan agreement is a transaction subject to the provisions of the Illinois Procurement Code (30 ILCS 500/1-1 *et seq.* (West 2002)). For the reasons hereinafter stated, it is my opinion that the proposed James R. Thompson Center mortgage-loan agreement creates "State debt," as that term is used in article IX, section 9 of the Illinois Constitution.

Accordingly, because the legislation authorizing the mortgage-loan transaction did not receive the required three-fifths vote in each chamber of the General Assembly, it is my opinion that the transaction is not authorized under the pertinent Illinois constitutional provisions. As a result of this analysis, your question regarding whether the transaction is subject to the provisions of the Illinois Procurement Code is rendered moot.

In an effort to respond to your request for an opinion, the staff of the Attorney General's office has been in frequent contact with representatives of the Department of Central Management Services and its outside counsel regarding the James R. Thompson Center (hereinafter the "Thompson Center") mortgage transaction. We have made repeated requests to review all documents related to the proposed mortgage-loan agreement well in advance of a proposed closing. Despite these requests, we were only provided with preliminary drafts of some, but not all, of the transaction documents on May 18, 2004. Revisions have been made to those documents on a frequent basis during the intervening period. Not until today, on the eve of the closing which was rescheduled earlier this week, were we provided with the preliminary final documents. Consequently, we have been unable to conclude our analysis of the principal issue raised in your request prior to this time.

Public Act 93-019, among other things, added section 7.4 to the State Property Control Act (to be codified at 30 ILCS 605/7.4), which authorizes the Director of the Department of Central Management Services "to dispose of or mortgage" the Thompson Center and the Elgin Mental Health Center in any of three specified ways. The mortgage-loan agreement that is the

focus of your inquiry has been developed pursuant to the provisions of subsection 7.4(a)(3) of the Act, which provide, in pertinent part:

(3) The administrator may enter into a mortgage agreement, using the property as collateral, to receive a loan or a line of credit based on the equity available in the property. Any loan obtained or line of credit established under this subdivision (a)(3) must require repayment in full in 20 years or less.

Subsection 7.4(e) further provides that any agreement to mortgage property under this section must be entered into no later than one year after the effective date of the Public Act.

As currently structured, the Department of Central Management Services has negotiated a mortgage-loan transaction with Société Générale, New York Branch, under the terms of which the State, acting through the Department of Central Management Services, will borrow \$216,800,000 through the execution of a mortgage-loan agreement which uses the Thompson Center as collateral. The loan documents include: a Loan Agreement, a Mortgage, an Escrow Agreement, a Deed Escrow Agreement, an Assignment of Leases and Rents Agreement, an Environmental Indemnity Agreement, and a Promissory Note. According to the Department of Central Management Services, the transaction also includes an insurance agreement covering loan payments, which has not been provided to us. The Loan Agreement, among other things, provides for a maturity date of 2024 and a 25-year amortization schedule, with equal monthly debt service payments, and the balance due on the maturity date. The Loan Agreement describes a number of events that will constitute default including: failure to make payment when due; failure to appropriate funds for payment; and a finding by a court that the loan documents are not

binding on the State. The loan documents also include various provisions requiring the State to indemnify the Lender and its affiliates upon the occurrence of stated events.

Article IX, section 9 of the Illinois Constitution of 1970 addresses the creation of "State debt" and provides, in pertinent part:

(a) No State debt shall be incurred except as provided in this Section. For the purpose of this Section, "State debt" means bonds or other evidences of indebtedness which are secured by the full faith and credit of the State or are required to be repaid, directly or indirectly, from tax revenue and which are incurred by the State, any department, authority, public corporation or quasi-public corporation of the State, any State college or university, or any other public agency created by the State, but not by units of local government, or school districts.

(b) State debt for specific purposes may be incurred or the payment of State or other debt guaranteed in such amounts as may be provided either in a law passed by the vote of three-fifths of the members elected to each house of the General Assembly or in a law approved by a majority of the electors voting on the question at the next general election following passage. Any law providing for the incurring or guaranteeing of debt shall set forth the specific purposes and the manner of repayment.

Under the language quoted immediately above, it is clear that "State debt" may be incurred only in accordance with the provisions of article IX, section 9 of the Constitution. It is necessary, therefore, to determine whether the Thompson Center mortgage-loan agreement is "State debt" and, if so, whether the legislation authorizing the State to enter into the agreement passed by a three-fifths vote.

With respect to the latter issue, Senate Bill 719 (which, as Public Act 93-019, enacted the provisions in question) was passed in the Senate by a vote of 33-25-1. It was passed in the House of Representatives by a vote of 72-44. If the mortgage-loan agreement creates "State debt," as that phrase is defined in the Constitution, then the legislation authorizing the transaction was required to have received 71 votes in the House and 36 votes in the Senate. Senate Bill 719 did not receive the requisite number of votes in the Senate to satisfy the three-fifths requirement of the Constitution.

Turning to the issue of whether the proposed transaction constitutes "State debt," we have exhaustively reviewed the provisions of article IX, section 9 of the Constitution, together with the debates of the framers relating thereto and the reported cases (*People ex rel. Ogilvie v. Lewis*, 49 Ill. 2d 476 (1971); *Day v. Regional Transportation Authority*, 66 Ill. 2d 533 (1977); *Geja's Café v. Metropolitan Pier and Exposition Authority*, 153 Ill. 2d 239 (1992)) and Attorney General's opinions (1971 Ill. Att'y Gen. Op. 123; 1977 Ill. Att'y Gen. Op. 17; 1977 Ill. Att'y Gen. Op. 99; 1979 Ill. Att'y Gen. Op. 24; 1991 Ill. Att'y Gen. Op. 148) discussing its requirements. Further, we have reviewed Public Act 93-019 and the legislative history concerning its passage. Based upon the above cited authorities, it is my opinion that the proposed mortgage-loan agreement involving the Thompson Center creates "State debt" as that term is used in article IX, section 9 of the Illinois Constitution of 1970.

Under the 1870 Constitution, State debt was construed by the courts to include only those debts secured by the full faith and credit of the State. However, the definition of State debt was changed in the 1970 Constitution to include not only debts "secured by the full faith and credit of the State," but also those "required to be repaid, directly or indirectly, from tax revenue." The drafters of section 9 deliberately made the definition of "State debt" broad enough to include those types of arrangements previously found by the courts not to constitute State debt. 1977 Ill. Att'y Gen. Op. 17, 18-9. Thus, whether the proposed mortgage-loan transaction is secured by the full faith and credit of the State, or is merely payable from tax revenue subject to appropriation, it falls within the broad definition of the phrase "State debt" as used in the 1970 Constitution.

It is our conclusion that the mortgage-loan agreement will, if consummated, create "State debt," for purposes of article IX, section 9 of the Constitution. We have carefully reviewed the structure of the transaction and the provisions intended to avoid the creation of State debt. Notwithstanding these provisions, this transaction will nonetheless create an indebtedness which will be "required to be repaid, directly or indirectly, from tax revenue," whether through satisfaction of the current obligations through appropriations or other means, or through foreclosure on the collateral. Although the General Assembly can authorize a State agency to incur State debt through legislation passed by at least three-fifths of the members of

each house, as noted above, Public Act 93-019 did not receive the requisite vote. Therefore, the Department of Central Management Services does not have the necessary statutory authority to enter into a mortgage-loan agreement of this character.

Although your inquiry did not raise the issue of indemnification, in reviewing the several loan documents, it is apparent that as an inducement to enter into the mortgage-loan agreement, the State has agreed to indemnify the Lender, and its affiliates, upon the occurrence of specified events or losses. It is the longstanding position of this office that the State may not indemnify private parties absent express statutory authority therefor. *See Ill. Const. 1970, art. VIII, §1(a), (b); see also e.g., 1973 Ill. Att'y Gen. Op. 78.* To do so raises additional significant issues involving the extension of the public credit and the creation of State debt.

Due to the time constraints involved, this response is necessarily only a very brief summary of our extensive analysis of the transaction. Should you require, we will provide a more complete explanation for your consideration as time permits.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lisa Madigan". The signature is fluid and cursive, with the first name "Lisa" and last name "Madigan" clearly distinguishable.

LISA MADIGAN
ATTORNEY GENERAL